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Supreme Court of the United States.

OCTOBER TERM, 1894.—No. 76.

CHARLES C. HARRISON, WILLIAM W. FRAZIER, ALFRED C. HARRISON, WILLIAM W. HARRISON and MITCHELL HARRISON, copartners trading under the name of HARRISON, FRAZIER & CO.,

Plaintiffs in Error,

vs.

HERMAN FORTLAGE, AUGUST MOLLMAN and ROBERT MESTERN, copartners trading under the firm name of A. TESDORPF & CO.,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

BUTLER, STILLMAN & HUBBARD,
For Defendants in Error.

WILLIAM ALLEN BUTLER,
WILHELMUS MYNDERSE,
Counsel.

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vs.

HERMAN FORTLAGE, AUGUST MOLLMAN and ROBERT MESTERN, partners under the firm name of A. Tesdorpf & Co.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of the Case.

This cause comes before the Court upon a writ of error to the Circuit Court of the United States for the Eastern District of Pennsylvania, to review a judgment entered upon a verdict rendered by the direction of the Court at the trial, December 4, 1890, in favor of the plaintiffs for the sum $65,881.

Judgment, Record, p. 11, *fols.* 26–28.
Writ of Error, Record, p. 1, *fol.* 1.

The action was commenced in the Circuit Court of the United States for the Eastern District of Pennsylvania, April 19, 1890, by the plaintiffs below, Messrs. A. Tesdorpf & Co., of London, England, against the defendants, Messrs. Harrison, Frazier & Co., of Phila-

delphia, to recover for the breach, by defendants, of a contract for the purchase of 2,500 tons of sugar, damages in the sum of $63,098.08, with interest from March 11, 1890.

The COMPLAINT alleged the copartnership and firm name and residence of the plaintiffs and of the defendants, respectively, and set forth the contract, dated New York, June 22, 1890, for the sale of about 2,500 tons of sugar to be shipped during that month from the Philippines to Philadelphia, per steamer "Empress of India," "at 5⅜ cents per pound ex ship, net landed weights," with further provisions as follows :

"Sea-damaged, if any, to be taken at a fair allowance.

"No arrival, no sale.

"Should the steamer, through any unforeseen circumstance, such "as accidents of the seas, stress of weather, &c., be unable to load "these sugars within the time specified, and the sellers cannot se- "cure other steam tonnage to load in June, this contract is to be "void."

The complaint then alleged that the shipment on the "Empress of India" was completed at Iloilo in the Philippine Islands according to the terms of sale and within the time specified therein, and the vessel sailed for Philadelphia ; that she encountered collisions and other perils of the sea, causing delays, damage and some loss of cargo, and in January, 1890, put into the Bermudas as a port of refuge, and there the master, under advice and instructions of surveyors, discharged about 700 tons of the cargo to lighten the vessel sufficiently to enable her to proceed on her voyage with safety in her damaged condition ; that the master secured other tonnage, to wit, the "Trinidad," to carry forward the said 700 tons of sugar to Philadelphia and proceeded on his voyage with the remainder of the cargo and arrived in Philadelphia ; that thereafter and before the arrival of the "Trinidad" the plaintiffs duly tendered to the defendants at Philadelphia the sugars which arrived in the "Empress of India," with notice that the sugars forwarded by the "Trinidad" would on arrival in Philadelphia be likewise tendered to the defendants, and that the defendants refused to accept the sugars so tendered.

The complaint then alleged a certain agreement made between the plaintiffs and the defendants in relation to a sale of the said sugars, and that the proceeds of sale pursuant to such agreement were $138,306.08, the best price obtainable, and that afterwards about March 3, 1890, the sugars discharged by the master at Ber-

muda and forwarded to Philadelphia by the "Trinidad" arrived there and was duly tendered by plaintiffs to defendants, who refused to accept the same; that an agreement as to the sale of said last-mentioned sugars was made which is set forth, and that the proceeds of sale pursuant to such agreement were $63,619.22, the best price obtainable.

The complaint then alleged full performance by plaintiffs and tender of delivery according to the custom of merchants and the contract alleged in the complaint, and claimed damages for the difference between the contract price of the sugars and the amount for which they were sold, in the sum of $63,098.08 and interest from March 11, 1890.

Complaint, Record, pp. 4–7, *fols.* 8–15.

THE ANSWER OR "AFFIDAVIT OF DEFENSE" averred:

That defendants at the time of making the contract mentioned in the complaint were sugar refiners and that they bought the cargo to supply their refinery with raw sugar for manufacture, which the sellers knew.

That the usual length of the voyage is two months and one week, and the "Empress of India," which sellers' agent expected to arrive not later than September 1, 1889, did not arrive until February 12, 1890, and then without having on board the goods purchased to be loaded and delivered by that vessel.

That during the time the vessel under ordinary circumstances should have arrived, the fall in the price of sugar was comparatively small, and plaintiffs' loss, as claimed, has resulted from the subsequent fall in the market value.

That owing to defects in her boilers the "Empress of India" did not reach Aden, in the Red Sea, until August 3, and to repair such defects unloaded her cargo and went to Alexandria for repairs; then returned to Aden, reloaded and proceeded on her voyage; then, for some cause unknown to defendants, proceeded to Bermuda, unloaded about 700 tons of her cargo; and then came with the residue to Philadelphia.

That the several tenders of the sugars at Philadelphia were not valid.

That the ship did not arrive with the cargo; and therefore the contract was not complied with, and that the sellers by their own acts made it impossible for them to perform the contract.

The answer admitted that a proper disposition was made of the sugar after the several refusals by the defendants to accept delivery, but alleged that neither tender was valid or legal and that defendants were not bound to accept any sugar under the contract except sugar brought by the "Empress of India" and loaded on her at the time and place stipulated.

The answer then averred as follows:

"The defendants do not refer to the delay of the voyage as a "substantive ground of defense. But they do insist that as the "contract shows time was made important or of the essence of the "contract, a delay exceeding three-fold the usual and expected time "must be taken into account in considering whether the perform-"ance as tendered was a performance as stipulated, and whether a "performance which could not be demanded by the defendants can "be compulsory on them, thereby making the contract based on "mutual promises optional on the part of one of them.

"The defendants therefore aver:

"(1) The plaintiffs have not performed their contract.

"(2) They have not offered to perform the same.

"(3) The defendants are not in default for not paying for the "sugar mentioned in the contract, and therefore no cause of action "exists against them on that contract."

Answer, Record, pp. 8, 9, *fols.* 18–22.

The answer was amended before trial so as to strike out the allegation as to defects in the boilers of the "Empress of India" and to insert instead that by reason of stress of weather the boilers were out of order and the vessel put into Port Said, awaiting orders, and while there was run into and so damaged that she could not proceed without repairing, and was then taken to Alexandria for repairs.

Amendment, Record, p. 10, *fols.* 23, 24.

The issue thus joined was tried at the Circuit, December 4th, 1890, before the Honorable WILLIAM BUTLER, U. S. Circuit Judge, and a jury.

THE LEADING FACTS APPEARING AT THE TRIAL WERE AS FOLLOWS:

A. Lueder, a commission merchant doing business in the City of New York, dealing principally in sugars and making sales by the cargo

and by lots, was, in June, 1889, agent for the plaintiffs A. Tesdorpf & Co., of London, and, as such agent, made the contract mentioned in the complaint with the representative in New York of the defendants Harrison, Frazier & Co., of Philadelphia. After verbal negotiations for some time the terms were reduced to writing as follows:

"NEW YORK, June 22nd, 1889.

"MESSRS. HARRISON, FRAZIER & CO., Philadelphia:

"DEAR SIRS—I have this day sold you, for account of Messrs. A. Tesdorpf & Company, of London, about twenty-five hundred tons of superior Iloilo sugars, usual assortment one-eighth No. 1, one-fourth No. 2, and five-eighths No. 3, shipping or to be shipped during this month from the Philippines to Philadelphia, per steamer 'Empress of India,' at five and five-eighths cents per pound *ex* ship, net landed weights, two per cent. tare. cash, less two and one-third cents in ten days from average date of discharge.

("Sea-damaged, if any, to be taken at a fair allowance.)

("No arrival, no sale.)

"Should the steamer, through any unforeseen circumstances, such as accidents of the seas, stress of weather, &c., be unable to load these sugars within the time specified, and the sellers cannot secure other steam tonnage to load in June, this contract is to be void."

"A. LUEDER."

Contract, Record, p. 12, *fol.* 30.

The plaintiffs proved at the trial that a price "*ex* ship" meant, in commercial usage, that the seller pays the freight and duties, and the buyer assumes all the landing charges as soon as the sugar leaves the ship's tackle.

Record, pp. 19, 23, *fols.* 44, 52.

This proof, when offered, was objected to by defendants, and exceptions taken to its admission *(Id.)*, but afterwards the same explanation of the words "*ex* ship" was given by one of the defendants, Mr. Frazier *(fols.* 76, 77*)*, and there was no conflict of evidence in this regard.

The defendants, Harrison, Frazier & Co., are sugar refiners in Philadelphia, carrying on operations requiring the use in their "refinery of about 1,000 tons of sugar a day," year in and year out. They were in 1889 very large buyers of sugar, purchasing in Phila-

delphia, New York, Boston, London, Hamburg and in the West Indies; "dealing with pretty much the whole trade."

Frazier, Record, pp. 33, 34, *fols.* 74, 75, 76.

They made the purchase to which the contract relates in the ordinary course of their refinery business and for use in the refinery, which fact was understood by the plaintiffs *(Id., fol.* 72*)*.

At the date of the contract the steamer "Empress of India" was at Iloilo in the Philippine Islands, and on the day following, June 23, 1889, she sailed thence for Philadelphia via Port Said and the Suez Canal *(Protest, admitted by stipulation as evidence, Record, pp.* 24–30, *fols.* 56–68*)*.

It was admitted at the trial by defendants that the shipment of the sugars on the "Empress of India" was "in the amount, quality and assortment and within the time specified" in the terms of the contract of sale of June 22, 1889 *(Stipulation, Record, p.* 24, *fol.* 54*)*.

The "Empress of India" encountered very heavy weather; she touched at Aden, August 4; renewed the bunkers, into which some molasses had oozed through the bulkhead, and proceeded on her voyage, entering the Suez Canal August 17, 1889, and arriving at Port Said August 18 *(Record, fol.* 58*)*.

While anchored at Port Said, on August 21, 1889, another steamer, the "Rheinfels," ran into the "Empress of India," knocking a large hole in her side and otherwise damaging her. Surveys were held, and, as the result, the cargo was discharged into lighters, and by recommendation of the surveyors, it being impossible to repair the vessel at Port Said, she was taken to Alexandria, where she arrived September 26, 1889, and was put on the dry dock, and such repairs, permanent and temporary, as were found necessary, after surveys, in order to continue the voyage to Philadelphia, were made. The steamer then returned to Port Said, arriving there November 13, 1889, and having reloaded her cargo, again proceeded on her voyage, November 30, 1889 *(Id., fols.* 59–61*)*.

The steamer again encountered very severe weather in the Mediterranean Sea and became leaky, and on December 11 came to an anchor at Gibraltar, where surveys were held and temporary repairs made. She resumed the voyage December 17, 1889 *(Id., fol.* 61*)*.

On January 1, 2 and 3, 1890, she was struck by extraordinary gales, and sustained such damage that on reaching Bermuda, as a port of refuge, and holding surveys, leaks were found in the top

sides and deck which had been badly strained. In order to make the vessel seaworthy to proceed to Philadelphia, the surveyors recommended a discharge of sufficient cargo to increase her freeboard two feet to reduce the straining to a minimum, as the necessary repairs could not be made at Bermuda *(Id., fols.* 62-64*)*.

While the "Empress of India" lay at Hamilton, Bermuda, her master went to New York and returned with a surveyor. After discharging cargo sufficient to give the vessel two feet more freeboard, the voyage was resumed February 6, 1890, and the steamer arrived at Philadelphia February 20, 1890, and discharged her cargo *(Id., fols.* 66, 67*)*.

The part of the cargo taken out at Bermuda was forwarded from Hamilton by the steamer "Trinidad" which arrived at Philadelphia, March 3, 1890 *(Id., fol.* 67 *; date of arrival of "Trinidad," fol.* 37*)*.

The plaintiffs had no control of the navigation of the "Empress of India." Their agent, Mr. Lueder, of New York, when apprised of the damage she had sustained at Port Said, and the necessary delay which might ensue, wrote the defendants under date of September 17, 1889, referring to the report from the steamer and saying: "It occurs to me that it might suit you to have the sugar come forward by some other steamer, if such arrangements could be made, and if the reshipment of the sugar would be expedited thereby. Will you be so kind as to give me your views on the subject? You will understand that my friends cannot take any steps whatsoever in this direction without your full consent, and with the distinct understanding that the reshipment by another steamer must in no way interfere with our contract nor any of its conditions save the 'non-arrival' clause. It is useless for me to make any suggestions to my London friends before I have your authority in the matter."

Letter of September 17, Record, p. 31, *fol.* 70.

Nothing whatever was done in this matter. So far as appears by the record, no notice was taken of the letter by defendants. Mr Lueder testified that his object in writing it was that, as from the information he had, it looked as if it might be a pretty long job and the market was declining, he thought it might be advisable for Harrison, Frazier & Co. to hurry up the voyage by change of the contract.

Lueder, Record, p. 35, *fol.* 78.

After the disaster which drove the steamer into Bermuda as a port of distress, no communication was made by the master to the plaintiffs or their agent in New York. The plaintiffs cabled from London to Mr. Lueder to instruct him to protest against any discharge of cargo in Bermuda, and Lueder notified the master to that effect while he was in Philadelphia, after he came from Bermuda, and before he returned *(Record, pp.* 21–23, *fols.* 47–50*)*.

The object of thus protesting was to avoid the heavy expenses incident to discharging at Bermuda, to which the underwriters objected *(Id., fol.* 47*)*.

The master's protest, made March 14, 1890, at Philadelphia, after final discharge and delivery of cargo, had no connection with the above action of the underwriters and the plaintiffs, but was the customary marine protest extended by a master at the end of a voyage during which disasters had occurred.

Immediately on the arrival of the "Empress of India" the plaintiffs notified the defendants of their readiness to deliver under the contract the sugar to be discharged from her, and that the sugar left at Bermuda, when it should come forward by the steamer "Trinidad," expected to sail from Bermuda for Philadelphia about February 27, 1890, would be delivered on arrival.

Letter of plaintiffs' agent to defendants, February 15, 1890, *Record, p.* 13, *fols.* 32, 33.

The defendants replied, declining to accept the sugar from the "Empress of India" under the contract, but admitting the tender of performance by the plaintiffs, and suggesting an arrangement for a disposition of the cargo by agreement, reserving all rights to each party as to who should bear the loss.

Letter of defendants, February 17, 1890, *Id., fol.* 34.

It was then agreed between the parties as follows:

"The sellers may sell the sugar on board the 'Empress of India,' to ascertain the difference between the selling price and the value on arrival. The sellers, if they shall tender the residue of the original cargo at a future day, or so much as may arrive, shall be deemed to be in the same position as if they held the sugar now on the 'Empress of India' until the arrival of such residue of the original cargo, and then tendered the whole that shall have arrived; the parties agreeing to this to save the expense of handling and storage or demurrage incident to such delay."

Record, p. 15, *fol.* 35.

By agreement of parties, the plaintiffs then sold the cargo of the "Empress of India" at private sale with like effect as if at public sale.

Record, fols. 35, 36, 37.

The discharge of the sugar began February 20th, 1890, and was completed March 5th *(Record, fol.* 37*)*.

On the arrival of the "Trinidad," the plaintiffs notified the defendants of their readiness to deliver under the contract the sugar on board of her, and to be discharged, to which the defendants replied, declining to accept the sugar under the contract, and proposing a like disposition and reservation of rights as in the case of the "Empress of India."

Id., fols. 38–40.

The sugar discharged from the "Trinidad" was thereupon sold as in the case of the "Empress of India."

Id., fols. 36–38.

The discharge of the sugar from the "Trinidad" began March 3d, and was completed March 5th *(Record, fol.* 42.*)*

The result of the several sales showed a difference between the contract price of the sugar and the net proceeds of sale of $63,098.08, which amount, with interest, the plaintiffs claimed as damages.

Record, fols. 14, 15, 37, 42.

It was conceded at the trial that, if the plaintiffs were entitled to recover, the above-mentioned sum amounting with interest, to $65,884.91, was the correct measure of damages.

At the close of the evidence, and after argument by both parties, the Court, on motion of plaintiffs' counsel, directed a verdict in favor of the plaintiffs for the agreed amount of the damages, $65,884.91, including interest to the date of the verdict.

The defendants excepted, and a bill of exceptions was afterwards duly made, signed and sealed, December 19, 1890. Aftewards, December 31, 1890, the defendants, by writ of error, brought the cause to this Court.

POINTS.

First Point. The undisputed evidence at the trial showed that the contract of June 22, 1889, for the sale, by the plaintiffs to the defendants, of about twenty-five hundred tons of sugar, was made in the regular course of the business of the contracting parties, respectively, as the result of verbal negotiations previously conducted; that it contained all the terms of purchase and sale, binding upon the parties, respectively, and was free from any ambiguity. Its construction was, therefore, for the Court.

Bowes vs. Shand, L. R., 2 App. Cases, 455, p. 462.
Seitz vs. Brewers' Refrigerating Co., 141 U. S., 510, p. 517.

No question arises as to the commercial signification of any part of the language of the contract, whether descriptive of the quality, and assortment of the sugars sold, or as to the meaning of the words "*ex* ship." These words, as used in the contract, are not connected with any stipulation for delivery of the sugar, but relate solely in their context and syntactically to the price of the sugar *(Contract, p. 4, fol. 9)*. According to the plaintiffs' witnesses and the testimony of the defendants, the words "*ex* ship" when connected with the stipulated price of a commodity sold, indicate, in their commercial use, merely that all expenses incurred up to the time the goods leave the ship's tackle are to be borne by the seller, and that all expenses incurred after that time are to be borne by the buyer *(Lueder, pp. 19, 20, fols. 44, 45, 46; Craig, pp. 23, 24, fols. 52, 53, 54; Frazier, p. 34, fol. 76)*.

This is the sense in which the term is recognized and applied in the commercial law.

See *Johnson vs. Macdonald*, 9 M. & W., 600, where the words "to arrive *ex* 'Daniel Grant,'" were held to intend "a delivery at the quay, out of the vessel, if she should arrive" *(p. 604)*, and *Neill vs. Whitworth*, 114 Eng. Com. Law Rep., 435.

Second Point. Time was not of the essence of the contract, except as to the single particular of the time limited for the shipment of the sugars on the "Empress of India" or "other steam tonnage." The shipment was required to be completed within the month of June, 1889. The contract contained no stipulation as to the length of the voyage or the time of arrival of the sugars in Philadelphia, nor did it create any obligation whatever on the part of the plaintiffs in respect to the time of arrival.

I. The answer of the defendants puts on record an express disclaimer that the delay in the voyage affords "a substantive ground of defense" (*Answer, Record, p.* 9, *fols.* 21, 22), and only asks the Court that it be "taken into account in considering whether the performance, as tendered, was a performance as stipulated, and whether a performance which could not be demanded by the defendants can be compulsory on them, thereby making the contract based on mutual promises optional on the part of one of them."

The plain answer to this suggestion of the pleadings is, *first*, there is no stipulation whatever in the contract as to the time of delivery of the sugars. As to this the risk, if any, was the defendants', so long as the delay of the voyage was not caused by any fault or omission of the plaintiffs, and, *second*, that there was nothing in the contract preventing the defendants from claiming and demanding a delivery of the sugars described in the contract whenever they should arrive at Philadelphia.

The contract was executory. It contained mutual promises and was equally binding on the plaintiffs to make shipment of the sugars within the time limited and on the defendants to accept delivery of the sugars on arrival at Philadelphia. *It was only in case of no arrival that there was to be no sale;* not in case of no arrival within any specified time.

The assumption made by the pleader that the plaintiffs could have taken advantage of the unusual length of the voyage to refuse performance of the contract by a delivery of the sugars on their arrival at Philadelphia is wholly unwarranted.

Manifestly, if the fluctuations of the market had been favorable to the defendants, instead of being adverse to them, and the price of sugars had advanced during the somewhat

protracted voyage of the "Empress of India," so that the sugars, when delivered at Philadelphia, would have been worth more than when they were shipped, the plaintiffs could not have cancelled the sale and kept the sugars for their own gain on the pretext that the length of the voyage had involved an unusual delay.

II. There is nothing in the case entitling the plaintiffs to be relieved from the performance of their contract of purchase because of the delay in the delivery of the sugars. The defendants were not speculators in sugar, buying in order to resell at a profit. They were refiners, purchasing the raw material for their own use. The contract was made in reference to operations on a very extensive scale, requiring the use of about 1,000 tons of sugar a day, on an average, "year in and year out." They were purchasers in all available markets; this particular purchase was for a quantity of sugar which would suffice for only two and one-half days' supply for their refinery, and was a purchase of 2,500 tons out of a grand total of over 350,000 tons during the year in which it was made (*Testimony of Mr. Frazier, one of the defendants, Record, p.* 33, *fols.* 74, 75).

This excludes the idea that the purchase was made or the contract entered into with reference to the arrival of the sugars at any particular time. Inasmuch as the need of 1,000 tons a day was a continuous one and was met by purchases in advance from "pretty much the whole trade" (*Id., fol.* 76), and as the sugars in question would be needed whenever they should arrive, irrespective of any precise date, it is difficult to see how the contingency of a loss through the decline of the market value during their delay in arriving would have worked any serious consequence, because such a decline would have affected the price of the sugars after they had been refined, even if the raw material had arrived and gone into the process of manufacture within the ordinary time of a voyage from the Philippines to Philadelphia.

III. The purchasers were, of course, equally entitled to a performance of the contract, according to its terms, whether they purchased the sugar for resale or for refining. The point is whether the contract, by its terms, or by fair intendment,

entitled them to a delivery of the sugars at any earlier time than on their actual arrival at Philadelphia. The contention of the plaintiffs in error is that as the time of shipment was prescribed by the contract and the usual length of a voyage from the Philippines to Philadelphia, if uninterrupted by sea perils, was known by both parties to be about three months, therefore, it was intended that, because the shipment was not to be later than June 30, 1889, the delivery was not to be later than September 30, 1889. If this had been the intention of the parties to the contract, it would have been as easy to fix a limit of time for the delivery as for the shipment of the sugars; but it is against all reason to assume that because the sellers were willing to come under obligations, by express stipulation, as to the time of shipment—a matter within their control—they accepted an obligation as to the time of delivery —a matter wholly beyond their control.

In respect to the length of the voyage certainty could not be predicated. The evidence is that "the usual time for the voyage of a steamer of the size and class of the 'Empress of India' from Philippine Isles to Philadelphia is about three months, *unless prolonged by accident and sea perils*" *(Stipulation, Record, p. 32, fol. 72)*. If the contract was made in contemplation of the fact, as thus stated, the contingency of "accident and sea perils" entered into such contemplation; and hence, the time of delivery was dependent on arrival, and only in case of "no arrival" was there to be "no sale."

To hold otherwise would be to import a new term into the contract, which the Court will not attempt. If it were attempted, to what duration of time should the voyage be limited, or at what date would the right to deliver the sugar terminate?

The parties were competent to deal with this, as with the other particulars of their contract, and the Court will not make a new contract for them.

IV. The cases in which it has been held that stipulations in contracts of sale prescribing the time of shipment either at a specified date or within a limited period, or at successive times, have a relation to the expected time of delivery, do not apply here. They are cases where the seller failed to make the shipment at the date specified or within the time

protracted voyage of the "Empress of India," so that the sugars, when delivered at Philadelphia, would have been worth more than when they were shipped, the plaintiffs could not have cancelled the sale and kept the sugars for their own gain on the pretext that the length of the voyage had involved an unusual delay.

II. There is nothing in the case entitling the plaintiffs to be relieved from the performance of their contract of purchase because of the delay in the delivery of the sugars. The defendants were not speculators in sugar, buying in order to resell at a profit. They were refiners, purchasing the raw material for their own use. The contract was made in reference to operations on a very extensive scale, requiring the use of about 1,000 tons of sugar a day, on an average, "year in and year out." They were purchasers in all available markets; this particular purchase was for a quantity of sugar which would suffice for only two and one-half days' supply for their refinery, and was a purchase of 2,500 tons out of a grand total of over 350,000 tons during the year in which it was made (*Testimony of Mr. Frazier, one of the defendants, Record, p.* 33, *fols.* 74, 75).

This excludes the idea that the purchase was made or the contract entered into with reference to the arrival of the sugars at any particular time. Inasmuch as the need of 1,000 tons a day was a continuous one and was met by purchases in advance from "pretty much the whole trade" (*Id., fol.* 76), and as the sugars in question would be needed whenever they should arrive, irrespective of any precise date, it is difficult to see how the contingency of a loss through the decline of the market value during their delay in arriving would have worked any serious consequence, because such a decline would have affected the price of the sugars after they had been refined, even if the raw material had arrived and gone into the process of manufacture within the ordinary time of a voyage from the Philippines to Philadelphia.

III. The purchasers were, of course, equally entitled to a performance of the contract, according to its terms, whether they purchased the sugar for resale or for refining. The point is whether the contract, by its terms, or by fair intendment,

entitled them to a delivery of the sugars at any earlier time than on their actual arrival at Philadelphia. The contention of the plaintiffs in error is that as the time of shipment was prescribed by the contract and the usual length of a voyage from the Philippines to Philadelphia, if uninterrupted by sea perils, was known by both parties to be about three months, therefore, it was intended that, because the shipment was not to be later than June 30, 1889, the delivery was not to be later than September 30, 1889. If this had been the intention of the parties to the contract, it would have been as easy to fix a limit of time for the delivery as for the shipment of the sugars; but it is against all reason to assume that because the sellers were willing to come under obligations, by express stipulation, as to the time of shipment—a matter within their control—they accepted an obligation as to the time of delivery —a matter wholly beyond their control.

In respect to the length of the voyage certainty could not be predicated. The evidence is that "the usual time for the voyage of a steamer of the size and class of the 'Empress of India' from Philippine Isles to Philadelphia is about three months, *unless prolonged by accident and sea perils*" *(Stipulation, Record, p. 32, fol. 72)*. If the contract was made in contemplation of the fact, as thus stated, the contingency of "accident and sea perils" entered into such contemplation; and hence, the time of delivery was dependent on arrival, and only in case of "no arrival" was there to be "no sale."

To hold otherwise would be to import a new term into the contract, which the Court will not attempt. If it were attempted, to what duration of time should the voyage be limited, or at what date would the right to deliver the sugar terminate?

The parties were competent to deal with this, as with the other particulars of their contract, and the Court will not make a new contract for them.

IV. The cases in which it has been held that stipulations in contracts of sale prescribing the time of shipment either at a specified date or within a limited period, or at successive times, have a relation to the expected time of delivery, do not apply here. They are cases where the seller failed to make the shipment at the date specified or within the time

limited, and where the purchaser refused to complete the purchase on account of such failure. In such cases it has been held that the purchaser had a right to insist on performance by the seller of the contract terms relating to the shipment, as a condition precedent of the seller's right to enforce the contract, and that time being of the essence of the contract, and delivery being delayed by the breach as to shipment, such consequent delay in delivery was a material fact.

Thus, in *Norrington vs. Wright*, 115 U. S., 188, p. 203, where the contract called for shipment of 5,000 tons of iron rails from a European port "at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880," and the seller shipped only 400 tons in February and 889 in March, the purchaser's right to rescind the contract was upheld, and this Court say : " In the contracts of merchants, time is of the essence. The " time of shipment is the usual and convenient means of fix- " ing the probable time of arrival, with a view of providing " funds to pay for the goods or fulfilling contracts with third " persons. A statement descriptive of the subject matter, or " of some material incident, such as the time or place of " shipment, is ordinarily to be regarded as a warranty, in the " sense in which that term is used in insurance and maritime " law ; that is to say, a condition precedent upon the failure " or non-performance of which the party aggrieved may re- " pudiate the whole contract."

And in *Cleveland Rolling Mills vs. Rhodes*, 121 U. S., 255, p. 261, another case of successive shipments, where the contract called for the shipment of the entire product of 14,000 tons of iron ore from a furnace in Michigan to a Rolling Mill in Ohio " as rapidly as possible " during the season of navigation of 1880, and such portion as is made after the close of navigation of 1880 to be shipped on the opening of navigation of 1881, or as near the opening as possible, and the seller failed to comply with these conditions, this Court applied the rule as laid down in *Norrington vs. Wright*, *ut supra*.

In *Hoare vs. Rennie*, 5 H. & N., 19, the contract of sale was for 667 tons of bar iron to be shipped from Sweden in June, July, August and September, and "in about equal portions each month." The seller made shipment in June of only about 20 tons, and the defendant's plea that this shipment in June was a failure to perform the contract entitling the buyer to execute the contract was sustained on demurrer by the plaintiff.

In *Bowes vs. Shand*, L. R., 2 App. Cases, 445, two contracts of sale were made in London, each for 300 tons of "Madras rice to be shipped at Madras or coast for this port during the months of March and [or] April, 1874, per 'Rajah of Cochin.'" The 600 tons filled 8,200 bags, of which 7,120 were shipped in February and of the residue, 1,030 bags were shipped in February and 50 in March. The House of Lords held in an action by the seller against the buyer for refusing to accept the cargo, that no recovery could be had, because the meaning of the contract, as apparent upon its face, was that all the rice must be put on board in March or April, or in one of those months.

In *Reuter vs. Sala*, L. R., 4 C. P. Div., 239, the contract was for the sale of "about 25 tons, more or less, black pepper, October and [or] November shipment, from Penang to London." The seller shipped no pepper in October, but afterwards shipped 20 tons in November and five in December, and in an action brought by him to enforce the contract, it was held that the buyer had the right to refuse to receive any part of the pepper.

In *Welsh vs. Gessler*, 89 N. Y., 540, the contract of sale was for a quantity of sugar to be sent from St. Vincent and to be "May-June shipment." No shipment was made until July, and the Court held that the purchaser was not bound to accept or pay for the sugars shipped in July, and was discharged from any obligation to take the goods.

V. The same principle is applied where the contract by its terms calls for delivery or successive deliveries at a specified time.

Coddington vs. Peleago, L. R., 2 Exch., 193: The contract was to supply goods, "delivering on April 17, completing 8th of May," and the seller made no delivery on April 17th. The Court held the buyer entitled to rescind the contract for breach of the condition precedent to its enforcement by the seller.

King Philip Mills vs. Slater, 12 R. I., 82: The contract was for successive deliveries, and the Court held the purchasers justified in rescinding the whole contract because of failure by the seller to make the first delivery as called for by its terms.

See, also, *Tyers vs. Rondale Iron Co.*, L. R., 10 Exch., 195.

VI. In the case at bar there is no question of the performance by the sellers of the terms of the contract of sale as to shipment within the designated time, viz., "during this month" (June, 1889).

The shipment was completed June 23, 1889).

Protest, Id. p. 25, *fol.* 56.

It is expeessly admitted that the shipment was completed "in the amount, quality and assortment and *within the time* specified" in the contract of sale.

Stipulation, Record, p. 24, *fol.* 54.

Third Point. The plaintiffs having fully performed the contract of June 22, 1889, in respect to the shipment of the sugars, were under no obligation, either by the terms of the contract, or by any rule of commercial law, in respect to the navigation of the "Empress of India" or any perils of the seas or disasters occurring during her voyage from the Philippines to Philadelphia. No such obligation was imposed by the contract.

I. The vessel, when she sailed from the port of shipment, was in every respect seaworthy, and in all things fit and provided for her intended voyage (*Protest, Record, p.* 25, *fol.* 56).

The plaintiffs had no more control over the navigation of the steamer, and no more power to prevent the occurence of sea perils or sea damage, than the defendants had. The contract provision, "sea damaged, if any, to be taken at a fair allowance," evidently contemplated the risk of injury to the cargo by perils of the sea; and the further provision, "no arrival, no sale," contemplated the possibility of a total loss by the same perils, so that, if no part of the sugars should arrive, the plaintiffs, notwithstanding the absolute terms of sale specified in the contract, were to be released.

II. The undisputed evidence shows that all the disasters and delays during the voyage of the "Empress of India" were caused by perils of the seas and of navigation, happening without the fault of the plaintiffs, or their knowledge, and were of a kind common in the experience of navigators.

When the enforced delay at Port Said came to the knowledge of the plaintiffs' agent he volunteered a suggestion to the defendants that it was perhaps possible to "hurry up the voyage" so as to allow the sugars to go forward from Port Said by another vessel (*Lueder, Record, p.* 35, *fol.* 78, and *Letter of September* 17, 1889, *p.* 31, *fol.* 70).

Nothing came of this suggestion, nor did the defendants, by reply to the letter, or in any other way, intimate that they held the plaintiffs responsible for the delay, or claimed that the contract was at an end, or otherwise affected by the unavoidable detention of the steamer.

The letter of September 17, 1889, was, therefore, wholly irrelevant and of no account.

III. If a trans-shipment of the sugars to another steamer had been made at Port Said, it would have been made purely for the convenience or profit of the parties or of the shipowners, and if made without the consent of the defendants would have imperilled the contract of June 22d. The plaintiffs' agent quite properly suggested the trans-shipment to the defendants, and very prudently left matters to take their course upon receiving no favorable response from them.

When the "Empress of India" was forced by the January gales into Bermuda as a port of distress and there obliged to undergo repairs and discharge a part of her cargo, in order to

give greater freeboard, as required by the Surveyors of the port, the plaintiffs protested against the discharge of the cargo in view of the heavy expense it would involve *(Record, p. 23, fol. 52)*. The protest afterwards made by the Master at the termination of the voyage was simply the usual document to establish the facts connected with the prosecution of the voyage.

The transshipment at Bermuda was not made for the convenience or profit of any individual. It was made through the exigency of circumstances resulting from perils of the sea, and cannot be attributed to the default, or even to the voluntary action of any individual. Sea perils had caused injuries to the steamer which could not be repaired at Bermuda, and which rendered her unfit to carry her entire cargo to destination.

IV. There was therefore no error in the exclusion of the evidence offered by the question put on the cross-examination of Mr. Lueder *(Record, p. 22, fol. 40)*. Q. "Did you at any time learn that this vessel was unseaworthy to carry forward her cargo from Bermuda to Philadelphia?"

This was wholly immaterial and irrelevant, because, as the plaintiffs had no control over the navigation of the "Empress of India," and were not responsible for the conduct of the voyage, hearsay information as to her condition in respect to seaworthiness or unseaworthiness at any time during the voyage, could have no possible effect upon the contract of sale or the rights or relations of the parties thereto, respectively.

The statement of defendants' counsel, made in connection with the question above referred to, that they desired to show the attitude of the plaintiffs towards the cargo and to see whether or not what was done was by their instructions and assent, or against their assent, did not help the question, or warrant the line of inquiry suggested. There was no offer of proof to show that the plaintiffs had ever done anything violate of the contract or prohibited by any of its terms.

Fourth Point. The defendants in error do not claim that the master of the "Empress of India" became the agent of the purchasers of the sugars shipped in her.

I. The Court below did not rest the decision on any such ground *(Record, fols.* 84, 85*)*.

II. The plaintiffs below did not assert any such ground of recovery. All that was claimed at the trial and all that is claimed now by the plaintiffs is that they were not responsible for the delay in the voyage or for the acts of the master; these were wholly beyond their control; their obligation to deliver was measured by the terms of their contract of sale and not by the contingencies or incidents of the voyage of the carrying vessel. These were not in the contemplation of either party in the making of the contract of June 22, 1889, except as sea perils were guarded against by the provisions—"*sea damage, if any, to be taken at a fair allowance;*" and "*no arrival, no sale.*" The labored effort of the counsel for the plaintiffs in error to refute a supposed claim on the part of the plaintiffs below that the transshipment of a portion of the sugars by the "Trinidad" was the act of the master, as the agent of the purchasers, is wholly futile and vain, inasmuch as no such claim exists. It is conceded that the master acted rightly and lawfully in what he did; what we claim is that the sellers had no control over his action, and that, so long as they performed the contract according to its terms, the purchasers cannot refuse performance on any ground arising from the *natural* occurrences of the voyage.

Fifth Point. The plaintiffs below having fully performed the contract of June 22, 1889, in respect to the shipment, the defendants below were bound by the contract to accept delivery of the sugars on their arrival at Philadelphia and as they arrived, notwithstanding that they did not all arrive by the "Empress of India," but that a part arrived by the "Trinidad."

I. There was nothing in the contract making either the carriage or the delivery of the subject of sale by the "Empress of India," a condition precedent to the right of the sellers to enforce the contract or constituting a warranty on their part that the delivery should be by that particular ves-

sel. On the contrary, any such interpretation is excluded by the express provision that, in the contingency named, even the shipment may be by "other steam tonnage," necessarily involving delivery by such other steam tonnage.

The contract provides that the shipment be made of a stated quantity and quality, and within a stated time; but does not provide either specifically, or by implication, that the delivery must be from the original receiving vessel. The shipment was to be made by sea, and subject, therefore, to the chances that attend transportation upon the sea.

The words "*ex* ship" are found in the contract only in the clause stipulating that the price to be paid for the sugars shall be "5§ cents per pound *ex* ship, net landed weights" *(Contract, p. 4, fol. 9)*, and the proofs show that in such a contract the words signify merely that the charges up to the time the goods leave the ship's tackle are to be borne by the seller, and that the charges after that time are to be borne by the buyer *(Lueder, pp.* 19, 20, *fols.* 44, 45, 46; *Craig, pp.* 23, 24, *fols.* 52, 53, 54; *Frazier, p.* 34, *fol.* 76*)*.

A similar significance was given to the words, "to be taken from the quay" in the case of *Neill vs. Whitworth*, where it was held that "the clause as to the place of delivery was not a condition precedent, but a mere stipulation in favor of the seller," and that the contract amounted, in effect, to a contract to deliver the cotton at a reasonable time, and under reasonable circumstances, the article to be at the buyer's charge from the time of its landing on the quay.

Neill vs. Whitworth, 114 Eng. Com. Law Rep., 435, and, on appeal, L. R., 1 C. P., 684, 686.

II. The answer or affidavit of defense avers that the "Empress of India" "did not arrive with the cargo, and, therefore, the contract was not complied with;" also, that the defendants "were not bound to accept any sugar under that contract, except sugar brought by the 'Empress of India' and loaded on her at the time and place specified."

Answer, Record, p. 9, *fols.* 20, 21.

Under this plea the main contention of the defendants below at the trial was that the contract called for the delivery of the sugars from the "Empress of India" and that in case

of non-delivery of the entire subject of the contract by that vessel there was a failure of performance by the plaintiffs and the defendants were absolved from any obligation under the contract because they were not required to accept a part for the whole, and the claim was that the mode of transportation by the "Empress of India" was an essential term of the contract which prescribed a double condition requiring both an arrival of the sugars and an arrival by the "Empress of India" so that sugars tendered in Philadelphia for delivery in part by the "Empress of India" and in part by the "Trinidad" are not the sugars described by the contract.

As no such double condition is written in the contract it can only be created by a construction leading up to one or the other of the following results: *First*, that while the contract expressly provides for shipment of the sugars, in a certain contingency, by other steam tonnage than the "Empress of India" it prohibits delivery in any event by any other steamer, or, *Second*, that in case all the sugars are shipped by the "Empress of India" the delivery of all as well as the shipment of all must be made by that steamer.

In either of the above alternatives this contention requires the Court to change the contract and recast its terms.

If the first alternative is adopted the provision permitting shipments by other steam tonnage must be excised.

If the second alternative is adopted the provision permitting shipments by other steam tonnage must be enlarged and qualified by adding a proviso that if the sugars are all shipped by the "Empress of India" they must also be delivered by that vessel and by no other vessel.

It is the latter alternative upon which the plaintiffs in error apparently rely. They concede that if the subject of sale was ascertainable and the title under the contract could pass to the purchasers without regard to the carriage and delivery by the "Empress of India" alone there is nothing in the defense.

III. The subject of sale specified in the contract was about 2,500 tons of sugars, "usual assortment, shipping or to be shipped during this month, from the Philippines to Philadelphia, per steamer 'Empress of India.'"

That this mention of the vessel by which it was expected that the carriage of the sugars from the port of shipment to the port of delivery would be made was not meant to describe as the only sugars deliverable under the contract, such as should be brought by the "Empress of India," and delivered as a whole at Philadelphia from her tackle, is manifest from the further provisions of the contract. It would have been as easy as it would have been indispensable, if delivery of the entire shipment from the "Empress of India" was to be a condition precedent, to have said so. No such provision, however, is contained in the writing. On the contrary, the express terms of the closing paragraph, by which "other steam tonnage" is permitted for the shipment and carriage of the sugars, provided, only, such shipment be made in the month of June, negatives the idea that the "Empress of India" was the only vessel by which the sugars were to be carried, and clearly implies that, in case she should be unable to receive the shipment, the sugars might be sent separately, and in more than one vessel. The words "other steam tonnage" are broad enough to permit the employment of as many steamers as the circumstances might require.

IV. The contract was entire for a specific quantity and quality of sugar. No question was made at any stage in respect to the quality. It is in evidence that the sugar was contained in bags, and so was susceptible of being separated; but this circumstance did not give the defendants a right of rescission or refusal to accept delivery, either as to the 47,000 bags tendered for delivery from the "Empress of India" or the 22,000 bags tendered for delivery from the "Trinidad." The entirety of the contract was not destroyed by the circumstance that the subject of the sale was of such character as to be divisible.

Mansfield vs. Trigg, 113 Mass., 350.

Tested by this rule, if the plaintiffs had delivered the sugars which came forward by the "Empress of India" and then refused to deliver those which came by the "Trinidad," they would have been liable to the defendants for a breach of the contract of sale. Because, although the packages of sugar were separable, the contract was for the delivery of the

whole quantity specified by its terms, and, correlatively, the defendants as purchasers were bound to take the entire amount of the sugars contracted for, irrespective of the circumstance that the packages were not only physically separable, but in the course of transmission had become actually separated.

The quantity which actually arrived at Philadelphia by the "Empress of India" was 47,000 bags out of a total of 69,000 bags (*Account of Sales, Record, p.* 15, *fol.* 36, *p.* 17; *fol.* 41). They were parcel of the sugars included in the contract of sale. By the terms of the contract it was only in case of "no arrival" that there was to be "no sale."

IV. More than two-thirds in bulk of the sugars covered by the contract arrived by the "Empress of India;" and, as there was nothing in the contract providing that in case of an arrival of a part only of the sugars by that steamer, there should be no sale, the contract remained in full force in respect to that portion of the cargo which actually arrived by her. Were this otherwise the defendants could have refused acceptance of the sugars brought by the "Empress of India," no matter within how short a time she had arrived after leaving the port of shipment, if any part of the cargo shipped on board of her was deficient; as if, for example, a part of it had been jettisoned in mid-ocean to lighten the ship and insure her safety in the further prosecution of her voyage. The taking out of the 700 tons of sugar at Bermuda was precisely to the same end, *i. e.*, to lighten the ship and enable her to proceed safely on her voyage; a precautionary measure which the event justified. The 700 tons left temporarily at Bermuda were not jettisoned and lost, but were saved and finally brought in safety to Philadelphia. The breaking of the bulk in this way and separating the cargo into parts so as to insure the safe arrival and delivery in two constituent parts of the whole quantity called for by the contract was not in violation of its terms, and was in order to its due performance.

V. The cases relied on by the plaintiffs in error fail to support their contention. They will be found, on examination, to relate to contracts of sale where, by plain descriptive terms, the subject of the sale was merchandise

shipped or to be shipped by and delivered from, a particularly designated vessel, as a condition precedent to an enforcement of the contract by the seller, *and where the seller had violated the condition.* In other words, where the precise mode of performance was prescribed by the terms of the contract.

Lovatt vs. Hamilton, 5 M. & W., 639, was an action by the purchaser for non-delivery by a seller under a contract for sale of fifty tons of palm oil "to arrive per 'Mansfield;'" during the voyage the master of the "Mansfield" transhipped part of her cargo to the "Watt," another and larger vessel. On the arrival of the "Watt" at Liverpool, the purchasers claimed delivery of fifty tons from the "Watt" out of the "Mansfield's" cargo on her and not receiving it, and after the arrival of the "Mansfield," which had only seven tons for delivery to the purchaser, brought suit for damages. The Court of Exchequer held that the arrival of the oil in the "Mansfield" was a condition precedent and that the purchaser was not entitled to the oil brought by the "Watt."

Johnson vs. McDonald, 9 M. & W., 609, was an action by a purchaser for non-delivery of 100 tons of nitrate of soda "to arrive *ex* 'Daniel Grant.'" The ship arrived without the cargo, but a quantity sufficient to enable the seller to complete the contract arrived subsequently by two other ships. The purchaser sued for the difference between the price of the soda at the time of the contract and the arrival of the "Daniel Grant." The Court held that the language of the contract rendered its performance conditional on a double event, the arrival of the vessel and the arrival of the cargo in her, and that the contract was not enforceable.

In *Neill vs. Whitworth* (L. R., 1 C. P., 684; 114 Eng. Com. Law. Rep., 435) the plaintiff had contracted October 2, 1863, to purchase 500 bales of cotton, guaranteed to be an October shipment from Calcutta and "to arrive at Liverpool per ship or ships," and "to be taken from the quay." The cotton was shipped in part by the "Talavera" and in part by the "Fort George." On February 3, 1864, the "Talavera" arrived at Liverpool with a cargo of cotton sufficient to fulfill

the contract up to 250 bales. The "Fort George" was wrecked in Carnarvon Bay, and the remaining 250 bales were sent from Carnarvon by rail to Liverpool and placed on a quay there. The purchaser refused to accept delivery tendered by the seller, and sued to recover damages for a breach of the contract. The plaintiff had a verdict, but on a rule *nisi* it was set aside, and a verdict ordered for defendants, the Court holding that the clause as to the place of delivery was not a condition precedent, and that the words "to be taken from the quay" meant no more than that the vendees should bear any extra expense incurred by the removal of the cotton to the warehouse.

The fact that the 250 bales shipped on the "Fort George" actually arrived in Liverpool by rail was apparently not deemed of material importance, although the contract specifically provided that the cotton should "arrive in Liverpool per ship or ships."

VI. As already noticed, under the foregoing Third Point, there is no question here of successive deliveries under a contract calling for such deliveries at stipulated times. Numerous cases turning on the construction and effect of such contracts and of conditions precedent in general in commercial contracts are discussed in the opinion of this Court in *Norrington vs. Wright*, 115 U. S., 188 *(ut supra)*, where some apparently conflicting decisions in England are commented upon, and the principle of the rule as settled in *Bowes vs. Shand*, L. R., 2 App. Cases, 455, is approved and applied in substance as follows: that where, by plain terms in the contract of sale, the seller has agreed to do any material thing in a specified time or in a particular way, or by designated means, the mode of performance of such a stipulation is a condition precedent to his right to enforce the contract, and the non-performance entitles the purchaser to rescind.

See opinion of Mr. Justice GRAY, 115 U. S., *pp.* 206–212.

In the case at bar the only stipulation which can be construed to be a condition precedent was as to the time of shipment of the sugars which was to be completed in the month of June, 1889, and this stipulation was fully performed.

The proper distinction was made by the New York Court of Appeals in the application of the rule as to conditions precedent entering into the description of the subject of the contract and the mode of performance, in *Cunningham vs. Judson*, 100 N. Y., 179, a decision almost *pari passu* with *Norrington vs. Wright* above referred to. The last-mentioned case was decided by this Court October 26, 1885. *Cunningham vs. Judson* was decided by the Court of Appeals October 13, 1885. Both cases affirm the same principle, while its application to the facts in the two cases respectively led in the former case to a denial, and in the latter case to an affirmance of the seller's right to enforce the contract.

In *Cunningham vs. Judson* the plaintiff contracted to sell to the defendants "about 500 tons No. 1 'Eglinton' Scotch pig iron for shipment in March, 1880, from Great Britain to New York by sail or steam vesssels at sellers' option deliverable *ex* vessels on arrival."

The plaintiff, instead of shipping the iron himself, negotiated for 500 tons—of the kind and quality specified—shipped by another firm in March, 1880, which arrived at the port of New York May 7th, and on its arrival at New York tendered this iron in performance of the contract to the defendant, who refused to accept it. The plaintiff brought suit, and at the trial the defendant had a verdict. On appeal the judgment entered on the verdict was reversed. The Court say *(p.* 189*)* per EARL, J.:

"If the proper construction of the contract between these "parties entitled the defendant to receive iron shipped by the "plaintiffs from Great Britain, then the judgment is right. "In that event the description of the iron purchased required "that it should be iron shipped by the plaintiffs, and, how-"ever unimportant that circumstance might be, it entered "into the contract of the parties, and the defendant could "not be required to take any other iron *(Hill vs. Blake*, 97 "N. Y., 216*)*. But as that circumstance is unimportant, it "should not be imported into the contract by a liberal con-"struction of the language used; nor should it be put there "if there is a reasonable doubt whether the parties intended "it to be included in the description of the iron in reference "to which they were dealing. The iron was to be No. 1

" ' Eglinton ' Scotch pig iron, and it was to be shipped in " March from Great Britain to New York. These were " material stipulations and sufficiently described the iron. It " was immaterial to the defendant whether it was shipped by " a sailing or a steam vessel, and hence the option was given " to the plaintiffs to deliver iron shipped by the one or the " other. The words ' for shipment,' must mean the same as " ' shipped,' and thus we have the phrase ' shipped in March, " 1880, from Great Britain to New York, by steam or sail " vessels at sellers' option.' This may mean that the sellers " were to have the option to deliver iron shipped by *them* by " sail or steam, or it may mean that they were to have the " option to deliver iron shipped by either method in the " month named. We think the latter meaning the most " probable and reasonable, and therefore adopt it.

" This iron, therefore, which was shipped from Great " Britain to New York by sail, and which was bought by the " plaintiffs while upon the vessel, answered the description " prescribed in the contract and was deliverable in fulfillment " thereof."

In *Smith vs. Myers*, L. R., 5 Q. B., 429, the contract, dated Liverpool, September 8, 1868, was for the sale of about 600 tons nitrate of soda expected to arrive per " Precursor." The contract was made with reference to nitrate of soda which had been purchased by Myers. Bland & Co., of Valparaiso, in July, 1868, and which, while lying at Iquique, the port of loading on the barque " Precursor," which had been chartered to take it to Liverpool to Myers, Son & Co., partners in the Valparaiso firm, was almost wholly destroyed by an earthquake September 1, 1868. The charter of the " Precursor " was thereupon canceled. Meanwhile, the Liverpool house of Myers, Son & Co., in ignorance of the earthquake, had sold the cargo to William Smith & Co. to arrive, and, on advising the house in Valparaiso of the sale, the latter firm bought another 600 tons, obtained an assignment of another charter of the " Precursor " and shipped the 600 tons on her December 23, 1868. The Liverpool house, on hearing of the earthquake, notified William Smith & Co. of the destruction of the cargo and that the contract was void. The purchasers on the arrival of the " Precursor " demanded a delivery of

the cargo under the contract of sale, and on the seller's refusal to deliver, brought suit. It was held that the action could not be maintained; that the cargo contemplated by the contract was not in existence at the making of the contract and was not the cargo contemplated by the parties; that it arrived by a different voyage than that contemplated by them, having come by the "Precursor" as the result of a mere accident, so that the contract was not performed either as to the subject or the voyage described in the contract.

VII. The term "No arrival, no sale," comes under the construction given in *Idle vs. Thornton*, 3 Campb., 273, where a contract of sale of tallow to arrive was made in London, with a proviso that "if it should not arrive on or before 31st December, 1811, the bargain to be void." The vessel carrying the tallow was wrecked off Montrose in November; the greater part of the tallow was saved and might have been forwarded to London so as to arrive before December 31. The sellers did not forward it, but sold it. The Court held, in an action by the purchasers, that, inasmuch as there was no arrival at London, the contract was at an end, and that the sellers were not responsible for the non-arrival.

Sixth Point. The rule is settled that in the construction of commercial contracts effect must be given to the entire contract, according to the intent of the parties as expressed in the language used by them according to its ordinary meaning, and that it cannot be contradicted, varied or enlarged by interpretation. The Court will not make a new contract for the parties.

Robbins vs. Rollins's Executors, 127 U. S., 622: This Court say, in construing the contract *(p. 633)*: "We cannot interpolate such a stipulation. It is not implied by anything that appears on the face of the contract; nor does anything in the surrounding circumstances authorize or require a construction of the contract that would import such a stipulation into it."

Coddington vs. Peleago, L. R., 2 Exchequer, p. 197, Baron MARTIN says: "The contract is in writing, and the rule of

" law is that it speaks for itself ; it can neither be added to " or contradicted nor varied. Again, the construction is to " be according to the plain and ordinary grammatical mean- " ing of the words used."

Hoare vs. Rennie, 5 H. & N., 19, *per* Baron POLLOCK: " Where parties have made an agreement for themselves, the Court ought not to make another for them."

Seventh Point. The defendants were bound to accept delivery of the 700 tons of sugars, which arrived at Philadelphia by the steamer " Trinidad," March 3, 1890, and were tendered to them by the plaintiffs. These sugars being a part of the twenty-five hundred tons described in the contract of June 22, 1889, and having arrived at Philadelphia were included in the sale and formed a part of the entire amount which the defendants had contracted to purchase. In the absence of any stipulation that all the sugars embraced in the contract were to go forward in the " Empress of India " and for the other reasons already stated, the fact that the sugars contracted for arrived by two vessels is immaterial, so long as they all arrived and were ready for delivery. It was only in case of no arrival at all that the contract was to fail.

By the express agreement of the parties February 19, 1890, it was provided that the sugars which arrived by the " Empress of India " should be sold to ascertain the difference between the contract price and the value on arrival and that, if the sellers should tender the residue of the cargo at a future day, they should be deemed to be in the same position as if they held the sugar which had arrived by the " Empress of India " until the arrival of the residue of the original cargo, and then tendered the whole that should have arrived *(Agreement, Record, p. 15, fol. 35)*.

The effect of this agreement was that, upon the arrival of the " Trinidad " with the residue of the cargo, there was in legal contemplation a tender of delivery of the entire cargo from the two vessels at the same time, and in fact the delivery

from both vessels was completed on the same day. The discharge of the sugars from the "Empress of India" was finished on the 5th of March, 1890, and that by the "Trinidad" on the same day *(Record, p. 16, fol. 37; p. 18, fol. 42).*

Eighth Point. The several tenders of delivery made by the plaintiffs February 15 and March 3, 1890, respectively *(Record, p. 13, fol. 32, p. 16, fol. 38)*, were in due performance of the contract of June 22, 1889, and, having been accepted as to their sufficiency, in form, by the defendants *(Record, Letter Feb. 17th, fol. 37; Letter, Mar. 3d, fol. 39)*, established the rights of the plaintiffs so far as readiness to deliver and tender of delivery are concerned.

Ninth Point. The selling of the sugars at Philadelphia, after the refusal of the defendants to accept delivery, having been made, in pursuance of agreements between the parties relating to the cargoes of both the "Empress of India" and the "Trinidad" for the purpose of arriving at the amount of damages recoverable by the plaintiffs, if entitled to recover at all, no question arises in respect to the sales or the amount of the plaintiffs' claim, and there was no error in the direction of the Court to the jury in respect to the amount of the recovery *(Record, p. 38, fols. 84, 85; Letters and Account Sales, Record, p. 14, fols. 35, 36, 40, 42).*

Tenth Point. There was no error in the direction of the Court of a verdict for the plaintiff for the amount demanded, the difference between the contract price of the sugars mentioned in the contract and the price realized at the sales being as ascertained, with interest to the date of the verdict, $65,884.91.

By the amicable arrangement between the parties as to the sale of the sugars, and their agreement in respect to the measure of damages in case the plaintiffs were entitled to a

recovery, all questions were eliminated from the controversy, except the single question of the plaintiffs' right to enforce the contract, and there was no error in the ruling of the Court below on this question in favor of the plaintiffs.

Eleventh Point. The judgment of the Circuit Court should be affirmed with interest and costs.

BUTLER, STILLMAN & HUBBARD,
Attorneys for Defendants in Error.

WILLIAM ALLEN BUTLER,
WILHELMUS MYNDERSE,
Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1894. No. 76.

CHARLES C. HARRISON, WILLIAM W. FRAZIER, ALFRED C. HARRISON, WILLIAM W. HARRISON and MITCHELL HARRISON, copartners, trading under the name of HARRISON, FRAZIER & CO., Plaintiffs in Error,

AGAINST

HERMAN FORTLAGE, AUGUST MOLLMAN and ROBERT MESTERN, copartners, trading under the firm name of A. Tesdorpf & Co., Defendants in Error.

Note to Brief for Defendants in Error.

A copy of the revised brief for the plaintiffs in error, furnished to us since our brief was printed, contains on pages 20 to 23, inclusive, a reference to the case of *Iasigi vs. Rosenstein*, 65 Hun, 591; s. c., 141 N. Y., 414.

The facts in that case were that the contract of sale under consideration provided for shipment of Smyrna canary seed "March steamer shipment from Turkey," name of steamer "to be given as soon as known." The date of the contract was March 16th, 1887. On April 22d, 1887, the name of the steamer was reported to be the "Aleppo." The merchandise purchased was all shipped in March, 1887, on board the steamer "Aleppo," sailing from Rodosto, in Turkey, but was transferred at Liverpool from that vessel to the "Aurania," which brought it to New York, when it was

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tendered to the buyer, who refused to accept delivery "simply and only because it was not brought by the 'Aleppo' to New York direct, but was transferred at Liverpool to the 'Aurania'" (see 141 N. Y., p. 416). The contention, as stated in the opinion of the Court of Appeals, was "that the buyer has the right to make his own contract on his own terms, and that these, however unimportant, cannot be disregarded by the Courts.

The Supreme Court at General Term upheld the defense on the ground that the arrival of the "Aleppo" in New York and delivery from that vessel was a condition precedent to the performance of the contract. At the trial plaintiffs offered to show that at the time of the making of the contract there was not and never had been freight steamers sailing direct from Turkey to New York, but that the invariable custom and usage was to carry the goods to Liverpool and there transfer them to a steamer for New York; and that such custom and usage was well known to all persons engaged in the trade. This evidence was rejected and a verdict rendered for the defendants, which the General Term has affirmed.

The material part of the opinion of the Court of Appeals is as follows:

"That affirmance is put upon the ground that the terms of the "contract provide for a shipment on a named steamer from Turkey "direct to New York; that an arrival of the goods at the latter "port by the 'Aleppo' is essential matter of description and a "condition precedent to the buyer's obligation to accept; and "that the usage or custom sought to be proved would contradict "the terms of the contract, and for that reason is inadmissible. "There is no doubt of the general rule, and it may be conceded for "the present to cover matters of description which are seemingly "unimportant, but the question here is as to the application of the "rule to the facts.

"The broker's notes do not, in explicit terms, require a shipment "direct and in the same steamer from Turkey to New York. Such "a construction is a matter of inference from words which do not "necessarily and inevitably involve that inference. The steamer of "shipment must be the 'Aleppo' from Turkey. The steamer of "arrival is not identified. It may or may not be the one first men-"tioned or another and different one. If it *must* mean the 'Aleppo,' "and *can* mean no other, the General Term were right; but if it *may* "mean the steamer of arrival, even though not the 'Aleppo,' then "there is an ambiguity, a doubt about the real contract intention, "which may be solved by proof of custom and usage. I think that "is the truth. Observe the language of primary description that in-"tended to identify the goods and prescribing the date and charac-

" ter of the shipment. There are two elements provided: First, " the property bought is to be 'good merchantable Smyrna canary " 'seed,' and, second, 'March steamer shipment from Turkey.' " That ends the description of what was agreed to be bought, for " the note goes at once to the question of price and other " details of the contract. Plainly, for some reason, the parties con- " tented themselves with saying simply 'shipment *from* Turkey,' and " omitted to add to New York, or other words indicating a direct or " unbroken voyage, and this omission occurs in the formal descrip- " tion of the goods, and where it was not to be expected if a direct " voyage was meant. The note then passes to other details. One is " 'goods to be taken from dock on arrival of steamer when ready for " delivery.' This sentence most certainly was no part of the descrip- " tion of the goods bought, and was not intended to qualify or af- " fect that description. It merely made a delivery on the dock, " from the steamer having the goods, a sufficient delivery. It does " not say what steamer, nor dictate that it must be the 'Aleppo.' " The final provision, 'name of steamer to be given soon as known,' " undoubtedly refers back to steamer of shipment. But it is said " that in all the terms of the broker's note but one steamer is referred " to. That, however, is the precise question. *Was* only one referred " to? The language admits of the possibility that two were referred " to; the steamer of shipment and the steamer of arrival; and it is " in view of that possible doubt as to the real purpose and intention " of the parties that the evidence of usage and custom was offered. " The moment it is shown that there was no steamer sailing direct " from Turkey to New York; that all importations from that coun- " try by steam came first to Liverpool and were there transshipped, " and that the goods bought, if transported by steam, must come " and could come in no other way, and that both parties and their " broker knew the fact, all doubt and ambiguity disappear. We " see at once that the provision for delivery, which says simply " 'steamer,' does not and cannot mean the Aleppo,' was not so in- " tended or understood, but refers to the steamer of arrival after the " necessary and contemplated transshipment at Liverpool. The " proof does not contradict the note; it simply explains it, and en- " ables us to choose between two possible constructions, either of " which the instrument will bear.

"We think the evidence should have been admitted, and that for " the error in excluding it the judgment should be reversed and a " new trial granted, costs to abide the event."

The reasoning of the Court goes beyond a mere disaffirmance of the rejection of the evidence of custom. It upholds the rule for which we contend by interpreting the contract under consideration as making a delivery from the steamer conveying the goods a sufficient delivery and holding that the steamer of shipment and the